Tuesday, February 26, 2002
In re

STEPHEN THOMAS MARKS, No. 00-10372

Debtor(s).

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STEPHEN THOMAS MARKS,

Plaintiff(s),

v. A.P. No. 01-1113

EDUCATIONAL CREDIT MANAGEMENT CORP., et al.,

Defendant(s).

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Memorandum of Decision

Debtor and plaintiff Stephen Marks filed his Chapter 7 petition in February, 2000. He owes defendant Educational Credit Management Corporation ("ECMC") approximately $205,000.00 in educational loans. In this adversary proceeding, he seeks to establish their dischargeability pursuant to § 523(a)(8) of the Bankruptcy Code on account of undue hardship.

Marks is 53 years old. He has a long history of mental illness, having spent ten months in a

state mental hospital at age 19 and suffered from bouts of alcoholism and drug abuse. He has been in therapy for the last 11 years, which has helped him to overcome his substance abuse problems, marry and have a child, and obtain his Ph.D. in organizational psychology.

Unfortunately, despite a vigorous and intense job search Marks has been completely unable to find a job in his field. He is currently working at a job which does not even require a high school diploma, making about $37,000.00 a year. This is the only meaningful employment he has been able to manage in the past 30 years. The reasons for his inability to find better work appear to be his age, lack of experience, and perhaps lingering psychological difficulties.

Marks' wife is a school teacher. Although she suffers from clinical depression, she is able to earn about $45,000.00 per year. Between the two of them, they have a net income of around $5,500.00 per month, which is very modest for the area in which they live. Their household budget is modest and there are no unreasonable expenses. They have made almost no provisions for their retirement.

Courts have established a three-pronged test for determining if there is undue hardship: first, that the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans; second, that additional circumstances exist suggesting that the debtor's financial condition is likely to continue for at least a significant portion of the repayment period; and third, that the debtor has made a good faith effort to repay the loan. In re Pena, 155 F.3d 1108, 1111 (9th Cir. 1998).

The court finds that Marks has met all three parts of the test. There is no way Marks and his family can maintain a minimal standard of living if forced to repay the loans. Given his age and psychological difficulties, the fact that he is now doing far better than he has ever done, and the fact that his young child will be a dependent until well after Marks has reached a normal retirement age, this condition will almost certainly persist for the rest of the repayment period. Marks has made a good faith effort to pay the loans, although this prong of the test is a poor one and deserves some discussion.

The statute provides that student loans are dischargeable if there is undue hardship. A "good faith" requirement is a creation of the courts and has nothing to do with hardship. In a case where a debtor has run up a large student loan debt with no intent to repay it, the debt should be nondischargeable pursuant to § 523(a)(2) for fraud. The court is uncomfortable with dicta which make the debtor's intent or good faith part of a test for hardship, especially when the statute requires the court to consider the hardship to the debtor's dependents as well as the debtor.

The court is unaware of any case which has found undue hardship but denied discharge of student loans solely because the debtor made no effort to pay, suggesting that this is not a true requirement. No court has suggested that a debtor who became a paraplegic a week after graduation would be denied discharge of his student loans because he never made a payment on them. In cases where there is true hardship, lack of payment is not an obstacle to discharge. See In re Brown, 227 B.R. 540, 546-7 (Bkrtcy.S.D.Cal.1998).

The biggest problem with the "effort to pay" requirement is that it seems to open up the door

to arguments like those made by defendant that the debtor is eligible for some sort of "income-sensitive repayment plan." Evidence relating to such matters seems to come uncomfortably close to evidence of settlement negotiations. Even so, defendant produced no evidence of a reasonable repayment schedule made available to Marks. The draconian plan put forth by defendant as reasonable made no allowance for the individual needs of Marks and his family.[1] Moreover, they would reduce him to penury for the rest of his life.[2]

In any event, the evidence in this matter established that Marks has acted in good faith. He made a diligent effort for more than three years to find work in his field. He made some payments on the student loans at issue here, and continues to pay on other student loans he can afford. The repayment options made available to him were not reasonable and his failure to accept them is not evidence of bad faith.

For the foregoing reasons, the court will enter a judgment that Marks' obligations to defendant are discharged. Marks shall recover his costs of suit.

This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and FRBP 7052. Counsel for Marks shall submit an appropriate form of judgment forthwith.

Dated: February 26, 2002

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Alan Jaroslovsky
U.S. Bankruptcy Judge

1. Among other things, Marks' need for psychotherapy is clear and appears to be the primary reason why Marks is able to make a decent albeit modest living for the first time in his life. Defendant's argument that this expense, among others, should be cut back in order to fund a repayment plan ignores the true needs of Marks and his family.
